

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2588 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

PATIDAR OIL CAKE INDUSTRIES

Versus

DY.COMISSIONER OF INCOME TAX

Appearance:

1. Special Civil Application No. 2588 of 1996
MR SN SOPARKAR, Senior Advocate with
MR TUSHAR P HEMANI for Petitioner No. 1
MR MANISH R BHATT for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 23/06/2004

ORAL JUDGEMENT

This petition under Article 226 of the Constitution of India challenges notices dated 6th January 1996 (Annexure "A Colly.") issued by the respondent under Section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for assessment years 1986-87, 1987-88, 1988-89 and 1989-90.

2. The petitioner, a partnership firm, is carrying on business and for the four assessment years filed its return of income. The assessment orders came to be passed under Section 143(3) of the Act for assessment years 1986-87, 1988-89 and 1989-90 while the assessment was framed for assessment year 1987-88 under Section 143(1) of the Act. By the impugned notices (Annexure "A Colly."), the respondent has sought to reopen the aforesaid assessments.

3. Mr SN Soparkar, learned Senior Counsel appearing on behalf of the petitioner submitted that the initiation of reassessment by issuance of the impugned notices under Section 148 of the Act was bad in law because -

- (i) as recorded in the reasons, the Assessing Officer had initiated the reassessment proceedings on the direction of the Commissioner of Income-tax and there was no satisfaction of the Assessing Officer as mandated by Section 147 of the Act;
- (ii) the action was initiated at the instance of the audit department;
- (iii) that the proviso to sub-section (1) of Section 80HHC of the Act was not applicable with effect from assessment year 1989-90 and hence there being no requirement, no breach can be ascribed to the assessee;
- (iv) that by way of statutory amendment, proviso to sub-section (1) of Section 80HHC of the Act was not applicable and hence there was no requirement in law to maintain the reserve as the proviso itself had been deleted with effect from 1.4.1989;
- (v) that merely because the reserve created by the petitioner was transferred to the capital account of the partners, such transfer did not mean that the reserve ceased to be utilised for the purposes of the business.

4. Mr MR Bhatt, learned Senior Standing Counsel appearing on behalf of the respondent placed reliance upon the reasons recorded and the affidavit-in-reply to contend that the Assessing Officer was satisfied that by reason of failure on the part of the petitioner to disclose income truly and fully income chargeable to tax had escaped assessment. That since the requirement for reopening had been fulfilled, the petition was not maintainable.

5. In light of the view that we are taking, it is not necessary for us to deal with various contentions raised on behalf of the petitioner as can be seen hereinafter. Section 80HHC was inserted in the statute book by the Finance Act, 1983 w.e.f. 1.4.1983. However, the said section came to be substituted by the Finance Act, 1985 w.e.f. 1.4.1986 and the substituted section carried the following proviso:-

"Provided that an amount equal to the amount of the deduction claimed under this sub-section is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised for the purposes of the business of the assessee."

The said provision continued even while the section underwent various amendments. However, by the Finance Act, 1988 with effect from 1.4.1989, Section 80HHC was substituted and the substituted section did not carry the proviso w.e.f. 1.4.1989.

6. As can be seen from the legislative history, the proviso remained on the statute book only from 1.4.1986 to 31.3.1989 i.e. for assessment years 1986-87, 1987-88 and 1988-89. Therefore, on a plain reading of the provisions of the Act, it is apparent that for assessment year 1989-90, there was no obligation to even create a reserve as stipulated by the aforesaid proviso. In absence of any such obligation there could be no case for escapement of income insofar as assessment year 1989-90 is concerned. The action for the said assessment year is, therefore, bad in law.

7. Insofar as the other three assessment years are concerned, namely, assessment years 1986-87 to 1988-89, it is apparent that the proviso only requires that an amount equal to the amount of deduction claimed under sub-section (1) of Section 80HHC of the Act is debited to the profit and loss account and credited to a reserve

account which is to be utilised for the purposes of the business of the assessee, and such debit and credit have to be made in the previous year in respect of which such deduction is claimed and is to be allowed. The petitioner has admittedly for the three years under consideration made such entries debiting the profit and loss account and crediting the reserve account. There is no dispute on this count. The case of the revenue is that during the accounting period relevant to assessment year 1990-1991, the petitioner transferred the reserve account created in the aforesaid manner to the capital accounts of the partners of the petitioner-firm. It is not the case of the revenue, and there is nothing in the reasons recorded to show, that the petitioner had failed to disclose truly and fully any income liable to tax for the three assessment years in question. In light of the fact that the assessments have been sought to be reopened after a period of four years from end of each of the assessment years in question, the provisions of Section 147 of the Act mandate that the Assessing Officer shall be vested with the jurisdiction to initiate reassessment proceedings only in case there is any omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for the year under consideration and such failure should result in income chargeable to tax escaping assessment. On a plain reading of the aforesaid provisions and the reasons recorded it becomes clear that there cannot be ascribed any failure or omission to the petitioner so as to vest the Assessing Officer with jurisdiction to reopen the assessments which were already finalised. In the circumstances, for assessment years 1986-87, 1987-88 and 1988-89 in light of the fact that the initiation by issuance of impugned notices is beyond the period of four years and the prerequisite conditions stipulated by Section 147 of the Act are not fulfilled, there is no case made out for upholding the proposed reassessment. The notices for all the four years are, therefore, bad in law and are quashed and set aside.

8. The petition is accordingly allowed. Rule made absolute. There shall be no order as to costs.

(M.S. SHAH, J.)

(D.A. MEHTA, J.)

zgs/-